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No. 27 and No. 41

Supreme Court of the United States

OCTOBER TERM, 1964

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*,

v.

DARLINGTON MANUFACTURING COMPANY, ET AL., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DARLINGTON MANUFACTURING COMPANY, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT DARLINGTON MANUFACTURING COMPANY

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November 25, 1964.

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STATUTES INVOLVED

Pertinent sections of the Labor Management Relations Act and the National Labor Relations Act are set out in an appendix to this brief (pp. 82-84, *infra*).

QUESTIONS PRESENTED

(1) Can the action of a corporate employer in terminating its business completely and permanently, irrespective of its reasons, violate Section 8(a)(3) or any other section of the National Labor Relations Act?

(2) Does a decision to terminate a business completely and permanently violate Section 8(a)(3) because one of the motives therefor was a reasonable belief that the conduct of a particular labor union elected to represent the employees would make it economically impossible to continue the business?

(3) Can a corporate employer's otherwise lawful decision to terminate its business and liquidate itself be rendered illegal by its relations with other corporations that in substantial part are under different ownership?

(4) If construed as prohibiting an employer from completely and permanently terminating its business, is Section 8(a)(3) constitutional?

STATEMENT

The Darlington Manufacturing Company, a South Carolina corporation, was founded in 1883. (R. 479). From that time until November 1956 it operated a print cotton mill at Darlington, South Carolina, manufacturing and selling cotton goods. It has no other plant or office.

Some time after it commenced operations, Darlington began selling its products through Deering, Milliken & Co. ("Deering Milliken"),[1] a New York cor-

[1] In 1960 Deering, Milliken & Co. participated in a corporate merger from which resulted Deering Milliken, Inc., respondent here. (R. 235-36).

poration, with its principal office and place of business in New York, New York. At that time and for some years thereafter, Darlington and Deering Milliken were under different ownership and control. The record shows, however, that in 1937 Darlington went through a bankruptcy proceeding as a result of which Deering Milliken, as one of the largest creditors, received in payment of its debt about 41 per cent of Darlington's common stock. (R. 391, 437). The majority stockholders of Deering Milliken were certain individuals who were members of a larger group consisting of the descendants of Seth Milliken (hereinafter sometimes referred to as the "Milliken family"). After 1937 certain members of this group also acquired stock in Darlington. When Darlington was liquidated in 1956, it had outstanding 150,000 shares of common stock, owned as follows (R. 1310):

Deering, Milliken & Co.	41.4%
Cotwool Manufacturing Corp. (of which members of the Milliken family owned a majority of the shares)	18.3%
Individual members of the Milliken family	6.4%
Directors and employees of Deering, Milliken & Co.	2.9%
Others (more than 200 stockholders scattered over the United States)	31.0%
Total	100.0%

In 1956 the president of Darlington was Roger Milliken, who was also president of Deering Milliken. However, in the textile business the operating head of a manufacturing company normally bears the title of treasurer, with the president occupying a status analogous to that of chairman of the board in other industries. (R. 120, 388-90, 583). Darlington's by-

laws provided specifically that the president should "have general supervision over the affairs of the company" and "preside at all director's meetings," whereas the treasurer was given "charge of the books and of all financial and general business of the company under the supervision of the Directors" (not of the president), and he was made responsible for hiring, firing, fixing rates of compensation and keeping directors informed as to the affairs of the company. (R. 1130-31, 1281; see R. 1192). Darlington's treasurer was James M. Oeland, who held no position in Deering Milliken or in any other textile company. (R. 268-69).

Deering Milliken and members of the Milliken family also owned substantial stock interests, ranging from 55 to 88 per cent, in corporations operating twenty-seven other textile mills. (R. 470-71, 1309-10).

Since the Korean War the textile industry generally, and Darlington in particular, had faced constant and serious economic difficulties. (R. 53, 411-21, 461-64). By reason of technological changes Darlington was unable to continue the manufacture of certain grades of cloth that had been its traditional specialty in the print cloth field and that in the past had furnished a somewhat higher margin of gross profit than was furnished by the products of the more modern of Darlington's competitors. (R. 409-10, 444). Darlington's plant building was erected around 1888. (See R. 391). Some time in 1955 Darlington employed Barnes Textile Associates, Inc., an independent textile engineering firm, to make a survey of its operations with particular reference to such matters as plant efficiency, speed of equipment and cost reduction and to make

recommendations with respect to these matters. (R. 400-01). This report was submitted to Darlington in August 1955 and it findings established that Darlington was not competitive with other mills.[2]

While Darlington had attempted to meet its difficulties and had undertaken a program of modernization for its plant (R. 392-95), in January 1956 the directors had rejected a proposal to undertake urgently needed modernization (air conditioning of the plant) because of their uncertainty as to whether Darlington would be able to continue in business (R. 399-400, 461).

In late 1955 and 1956 Darlington's problems were intensified. Competition from Japanese imports increased the economic strain on Darlington. (R. 411-15).[3] Textile prices declined sharply and steadily throughout the first six months of 1956 (R. 60, 418-21), and a large number of mills were being forced to go out of business (R. 416-17).[4] In August 1956 the treasurer advised the president that Darlington would show a substantial loss for the year. (R. 61, 427, 443). Indeed, except for the years affected by World War II and the Korean War, Darlington had been a marginal operation for some time. (R. 391-

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[2] Among other things the report found that the weave room floor of the Darlington plant was so old that it could not withstand the vibration of modern high-speed looms. Hence Darlington planned to construct a concrete bed designed to take these looms on the ground level outside the existing plant building. (Tr. 720).

[3] Japanese cotton imports, in the form of woven goods and garments and in fabricated form, had continued to increase in 1955 and early 1956. (R. 458-59).

[4] In the twelve months preceding June 30, 1956, 400,000 spindles had been liquidated in the industry; this equalled approximately nine mills of Darlington's size.

92). For the period between 1952 and 1955 Darlington's earnings on the invested capital were:

1952	1.5%
1953	8.0%
1954	2.0%
1955	3.0%

One of Darlington's principal problems for some years had been the refusal of a minority of its working force to cooperate with management in instituting more efficient, economical methods of work assignments on modern equipment in order to reduce costs. The effectiveness of such a program depended upon the cooperation of Darlington's work force. The cost reductions to be achieved would to some degree result in a reduction in the number of jobs. The possible job reductions led a part of Darlington's work force to take an antagonistic position toward any modernization program. This was a matter that had given the management of Darlington considerable concern. (R. 401-09, 454-58, 481).

In March 1956 the Textile Workers Union of America began a campaign to organize Darlington's employees. (R. 51). At that time the employees were not represented by any union. The union campaigned primarily on its promise to the workers that it would prevent Darlington from carrying out the work assignments and procedures that the company believed necessary to reduce costs to the point where the plant could continue in business. (R. 422-23, 1275-80).

An election was held under the direction of the National Labor Relations Board on September 6, 1956, which was won by the union by a vote of 256 to 248. (R. 52). On the next day, Roger Milliken, who had

played no part in the unionization campaign, was advised of the result of the election by Oeland and Darlington's lawyer, Poag. Milliken and Poag conferred about the election in Milliken's office in Spartanburg. Oeland had previously informed Milliken of the minority of employees who were resisting the efforts of management to introduce more efficient methods. (R. 423). In answer to Milliken's question Poag said that election indicated that the minority had become a majority (R. 423), and Milliken

> "felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed, that if before we had had some hope, possible hope of achieving competitive course by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union whose principal promise as I read it was that they would help the employees to see that they got control of work assignments, would take the stretch-out, so called, into their own hands, would stop it, would prevent management from going ahead with the work assignment changes." (R. 457; see the examiner's findings on this point, R. 56-57).

In consequence Milliken decided that the directors of Darlington should meet to review all the adverse economic factors and to determine whether it would be economically feasible for Darlington to remain in business. (R. 424-25, 469-77). He suggested such a meeting to some of the other directors, and they agreed. A meeting of the directors was held on September 12, 1956,

at which the total economic picture and prospects of Darlington were reviewed. As a result, the directors voted to recommend to the stockholders that the Darlington plant be closed, that the company undergo complete liquidation and that the assets be distributed among the shareholders. (R. 426-31). Before the stockholders' meeting was held, a general wage increase went into effect in the textile industry, which, if adhered to by Darlington, would have added $120,000 annually to Darlington's costs and thus increased its losses. (R. 470-73). A stockholders' meeting was held on October 17, and after discussion the stockholders voted to approve the recommendation of the board of directors. (R. 431-36). The vote was 134,911 shares in favor of liquidation (89.9 per cent) and 3,774 shares against. (R. 1265).

Thereafter, Darlington accepted no new orders for goods. It completed some of its existing orders, cancelled one and sold the others to other textile mills on an open-market basis. (R. 177). Beginning on October 18, as the raw materials on hand were utilized and the work ran out, employees were discharged and departments closed. All operations were terminated on November 24. (R. 53). The plant's equipment and furnishings were sold at auction on December 12 and 13; the plant was offered for sale as a whole but was sold piecemeal for a greater total amount. (R. 53, 258).

The examiner found that the liquidation of Darlington was bona fide and complete and did not represent a device or subterfuge by which any business was transferred to other textile mills in which the Milliken family had an interest. (R. 176-86). The record fully supports the findings of the examiner, and the

Board is bound by them.[5] Of the orders that Darlington could not fill because of the liquidation, some were sold to other mills in which the Milliken family had an interest and some to wholly unrelated mills; all were sold on an open-market basis with a premium or bonus to reflect price changes, and one order was transferred to a mill in which there was a Milliken interest only after an attempt to transfer it elsewhere had failed. (R. 177-78). The examiner said flatly: "There is no basis for concluding that the transfers favored other Deering Milliken mills. . . ." (R. 177). There was no evidence that following the liquidation the production and sales of other mills in which there was a Milliken interest rose on account of acquiring customers formerly served by Darlington. (R. 178).

On October 16, 1956, the union filed unfair labor practice charges against Darlington, and on November 1, 1956, it amended its charges to include Deering, Milliken & Co. (R. 1241). On December 4, 1956, a complaint issued against Darlington only. The Board's Regional Director declined to issue a complaint against Deering, Milliken & Co. Hearings were held before the trial examiner in January and February of 1957. On April 30, 1957, he filed an intermediate report. In it he recognized that Darling-

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[5] Petitioners now suggest that these findings were inaccurate. (NLRB Br. pp. 39-40; AFL-CIO Br. p. 13; TWUA Br. p. 16). In its decision, however, the Board adopted all the findings of the examiner not inconsistent with its opinion. (R. 4). There is nothing in the opinion of the Board that in any way qualifies or is inconsistent with the examiner's findings on this point. The court below put it this way: "No disagreement with this finding was, or on substantial evidence could have been, expressed by the Board." (R. 1900). The union did not seek certiorari on this question.

ton "had faced constant difficulties" since the Korean War. (R. 53). He found that "there was and for a long time had been economic basis for liquidating . . ." (R. 55), and he rested this finding on evidence relating to Darlington's economic and competitive problems some of which has been summarized at pp. 4-6, *supra*. (R. 53-67). He found, however, that Darlington's decision to liquidate was influenced in some measure by the union's successful campaign and that but for the election the decision to liquidate would not have been made at the time it was made. For that reason he concluded that the decision to liquidate violated Sections 8(a)(3) and (a)(5) of the National Labor Relations Act.

The examiner did not find, however, that Darlington's decision to liquidate was prompted in whole or in part by any intent to discourage union activity in any other mills in which either Deering Milliken or members of the Milliken family held stock interests.

Finally the examiner concluded that although there had been a violation of the Act there was no duty to reinstate the discharged workers and no back pay liability should be imposed because Darlington had completely and finally gone out of business and because "it has not been established with the certitude or definiteness which the law requires that, but for the discriminatory motive, the plant would still be in operation or that it would have continued in operation in whole or in part to a certain date after operations were in fact terminated." (R. 45).

The case was argued before the Board in September 1957. On December 16, 1957, the Board issued an order (with two members dissenting) that did not decide the issues presented but instead remanded the case

to the examiner for further hearings as to whether Darlington, Deering Milliken and other corporations together constituted a "single employer." (R. 87). (This is a concept developed by the Board to permit Board orders to be directed to a group of corporations (or one or more members of such a group) with which a corporation found to have committed an unfair labor practice has such a relationship—common ownership, control of labor relations and the like—that it is rational to treat all the corporations as one employer.) On February 3, 1958, a first amended complaint was issued, adding Roger Milliken and Deering Milliken as parties.[6] It was assumed by the examiner and by the parties "that the remanded question of single employer status has been presented in connection with the question of remedy rather than for possible finding of violation by other, if related, corporations." (R. 110; see also R. 512).

After many further procedural steps and delays not directly relevant here, the trial examiner on December 31, 1959, filed his third intermediate report, finding after an exhaustive analysis that no "single employer" status existed between Darlington and any other corporation or group of corporations or persons. (R. 101-231). Exceptions and briefs were filed with the Board. On January 9, 1961, the union moved to reopen the case on the ground of newly discovered evidence on the "single employer" question. On February 15, 1961,

[6] The Board eventually held, after many intervening procedural steps, that the complaint as to Roger Milliken should be dismissed. (R. 29-30). The union contests that holding before this Court. There is no merit to its challenge. The point, such as it is, is adequately treated in the Board's brief. (NLRB Br. pp. 48-49 n. 44).

the Board by a 3-2 vote remanded the case to the examiner for still further hearings.

Thereupon Deering Milliken brought an action in the United States District Court for the Middle District of North Carolina, in which it asked the court to restrain the Regional Director of the Board from holding additional proceedings on the ground that they would violate the requirement of Section 10(e) of the Administrative Procedure Act that agencies conduct their proceedings without unreasonable delay. The court granted such an injunction, which in principal part was affirmed by the Court of Appeals for the Fourth Circuit in *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961). That court held that the further proceedings contemplated would be "a violation of . . . the Board's duty to proceed with reasonable dispatch to conclude the proceedings." 295 F.2d at 867. The court did, however, permit one further limited remand. A short additional hearing was held, and on March 23, 1962, the examiner issued his second supplemental intermediate report again holding that no "single employer" status existed. (R. 232-46).

On October 18, 1962, the Board issued its decision. (R. 1-33). By a vote of 4 to 1, the Board held that the liquidation of Darlington was illegal even though it was deemed to be the complete and final liquidation of a single business, since even such a liquidation violates Section 8(a)(3) if it is motivated in part by considerations stemming from union success in a representation election. By a vote of 3 to 2, the Board awarded back pay to Darlington's former employees from the time of their discharge (six years previously) until Darlington should reopen and offer them employ-

ment, or until they could find employment elsewhere. By a vote of 3 to 2, the Board reversed the examiner and held that Darlington, Deering Milliken and the other mills in which the Milliken family had an interest constituted a "single employer."

The Board, utilizing the "single employer" theory, made Deering Milliken liable for back pay until it offered Darlington's discharged workers employment at other "Deering Milliken" mills. In a single, off-hand paragraph the Board also extended its "single employer" theory to reach liability as well as remedy by saying that even if it were true, as Darlington contended, that as a single, separate corporation it could go out of business regardless of its motives without committing an unfair labor practice, it could properly be considered a unit of the "single employer," and it is an unfair labor practice to close down part of a business because of anti-union motives. (R. 18).

On appeal, the Court of Appeals for the Fourth Circuit en banc reversed. It held, with two judges dissenting, that an employer may lawfully discontinue its business in whole or in part for any reason, so long as such discontinuance represents the complete, final and bona fide termination of a particular economic unit of enterprise. (R. 1894-1914). On this view of the case the court did not reach other questions: the appropriateness of the legal standards against which the Board judged whether Darlington was a "part" of a single employer; the lawfulness of its use of the single employer concept, not as a remedial device, but rather to create a violation where there otherwise would have been none; and the substantiality of the evidence that moved the Board to find a single employer relationship, in complete disagreement with its examiner, who had

heard and carefuly analyzed the mass of evidence that went to the question. Nor did the court decide whether the Board was correct in its holding that the decision to liquidate at the particular time in question was not prompted by business reasons.

SUMMARY OF ARGUMENT

I

Although the Board in this Court no longer attempts to defend its decision that Darlington, considered as a separate and distinct corporate entity, committed an unfair labor practice by liquidating itself and going out of business, the right of Darlington to go out of business remains the key to decision of this case. If a withdrawal from business is complete and final and does not represent a subterfuge for carrying on business in some other way or at some other place, it is immaterial whether the business is part or all of the employer's profit-making activity. Darlington's withdrawal was of this order, and therefore it did not commit an unfair labor practice by that withdrawal.

A. The relevant sections of the National Labor Relations Act regulate only "employers" and therefore do not reach the act by which an employer withdraws himself from that category. The statute does not define "employers" artificially to include former employers. Thus there is, contrary to the conclusion of the Board in its decision and the contention of the union in this Court, no literal violation of the pertinent subsections of Section 8 of the National Labor Relations Act. Moreover, an inquiry that goes beyond the words of Section 8 and into Congressional policy and purpose in labor relations regulation makes clear that the Board

in its decision and the union in its present argument are wrong.

In our society one has the right to choose, for any reason, whether to engage in business as an employer. When he does choose so to engage he gains the opportunity to operate at a profit and suffers whatever obligations may be imposed upon him by the Government, including the obligations of the National Labor Relations Act. These are conditions upon the activity of employing workers. One may avoid these obligations but only at the cost of forgoing the opportunity of making a profit. One has no obligation to become an employer and thus undertake the obligations, and likewise the statute imposes upon him no duty to remain an employer. Were the National Labor Relations Act to be construed as imposing such an obligation it would constitute an anomaly in our system of law.

B. The legislative history of the National Labor Relations Act discloses not the slightest intimation that Congress meant by that Act to abridge an employer's right to go out of business for any reason he chooses. Indeed, when the question was raised in the House whether there was anything in the bill that became the Wagner Act abridging the right to close a plant, the answer was a flat and unequivocal "no," and in the Senate a sponsor of the bill made clear that "no one can compel an employer to keep his factory open." 79 Cong. Rec. 7673, 9682 (1935).

C. Judicial opinions, including the opinion of this Court in *Southport Petroleum Co.* v. *NLRB,* 315 U. S. 100, 106 (1942), have proceeded on the same natural and unquestioned assumption that an employer does not commit an unfair labor practice by going out of business. The attempts to distinguish these cases,

notably *NLRB* v. *New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954), are not successful, and cases cited by petitioner for the proposition that a complete withdrawal from business may be an unfair labor practice are not in point.

D. Despite the Board's powers to fashion remedial orders that, in the case of a violation of Section 8(a)(3) of the Act, should restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941), the Board was enabled to issue a remedial order in this case that on its view satisfied the *Phelps Dodge* standard only because of the accident of Darlington's relationship to certain other textile corporations. The ordinary remedy of reinstatement and back pay was unavailable, and what could be ordered against Darlington alone was considered by the Board as "clearly inadequate." The fact that, with all its broad remedial powers, the Board thus found itself unable to provide redress for what it considered an unfair labor practice is indicative that the unfair labor practice does not exist.

II

Darlington was a marginal operation, with a loss projected for the year in which it liquidated itself. The advent of the union threatened to heighten Darlington's financial crisis. In these circumstances the Board was plainly wrong in holding that the decision to close the Darlington plant was motivated by reasons proscribed by the statute. As many courts of appeals have held, the advent of a union can be an economic circumstance that an employer is properly entitled to take into account in making business judgments. In-

deed, in the case of a step as drastic as liquidation of an entire business the presumption is overwhelming that if union activity played a part in the decision it was because of the demands reasonably to be expected from the union and the probable inability of the employer to satisfy those demands within the resources of his enterprise.

The Court of Appeals accepted, for the sake of argument, the Board's findings and its legal theory with respect to the factors that moved Darlington to liquidate itself. If this Court believes that, contrary to our view the Board's holding was not erroneous as a matter of law, the case must be returned to the Court of Appeals for a determination whether substantial evidence underlay its findings.

III

The Board's finding that Darlington and some other textile corporations and a sales agent and factor together constituted a "single employer" is erroneous as a matter of law and does not, in any event, justify treating the liquidation of Darlington and the closure of its plant as an unfair labor practice.

A. Even if the liquidation of Darlington is considered as the liquidation of a portion of the "Deering Milliken" textile business, such a partial liquidation, when it is complete and final and not a subterfuge for carrying on the business elsewhere or in a different form, is properly subject to the same standards as those applicable to a complete liquidation. The employer has withdrawn the capital invested in the part of business and has renounced *pro tanto* his opportunities for business success. No decided case is to the contrary; each involves a temporary shutdown, an arti-

ficial rearrangement of a business for anti-union reasons or some other factor that distinguishes it from Darlington's case. Moreover, despite the Board's "single employer" finding, it remains a fact that Darlington was a separate corporation with its own textile mill, and it is not properly analogized to a part or division of some single corporate entity.

B. Treated as a unit of a "single employer," Darlington could properly consider the economic impact of the advent of a union in deciding to liquidate just as it could if considered as a separate employer.

C. The Board's "single employer" doctrine has not been used before this case to impose a substantive liability where otherwise there would have been none. It has been solely a remedial device. That is at least a reason for demanding a greater unity of the entities thought to comprise the "single employer" than is customary in "single employer" cases, where the only question is whether it is fair, because of their relationship, to make corporation B redress a violation indubitably committed by corporation A. In any event, one of the elements of the "single employer" doctrine is substantial identity of ownership, and on the undisputed evidence that element is not, as a matter of law, present here. The so-called Milliken family, which the Board apparently viewed as binding the corporations together, consisted of 27 different individuals and an estate, who were not shown to act as a unit. Moreover, there were substantial minority, independent holdings in the corporations, including Darlington. On these facts the identity of ownership necessary to a finding of a "single employer" is absent.

* * * *

For one or more of the reasons stated, the Court should affirm the judgment of the Court of Appeals without reaching the question whether the Board's finding of "single employer" status is supported by substantial evidence. If, however, that question does have to be reached, the case should be returned to the Court of Appeals to make the initial review of the evidence that is contemplated by the statute. *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404 (1962); *NLRB* v. *Universal Camera Corp.*, 340 U. S. 474 (1951).

IV

If the statute is construed as the Board has construed it in issuing its order against Darlington in this case, grave constitutional questions are raised.

A. Congress' power under the Commerce Clause ends when the connection with interstate commerce of persons or things sought to be regulated terminates. The whole structure and the specific terms of the National Labor Relations Act demonstrate that Congress enacted it in full recognition of this limitation upon its power, and that it sought only to regulate the relationships of employer and employee so long as the employer was engaged in commerce or an industry affecting commerce. To construe the statute as providing sanctions against an employer's removing himself from the reach of the statute by quitting the category of employer would be to extend it not only beyond the intent of Congress, but also beyond Congress' power.

B. Were the Board's remedial order against Darlington allowed to stand, it would amount to a deprivation of property without due process of law in violation of the Fifth Amendment.

V

Even if a violation could be found based upon Darlington's liquidation, the union's proposal that Darlington be ordered to reconstitute itself and re-enter the textile milling business must be rejected as utterly without merit. Such an order would almost certainly be unconstitutional and would be punitive and utterly impracticable whether it was regarded as directed to the former shareholders of Darlington or to the other respondent, Deering Milliken. Any other question as to remedy that there may be after this Court disposes of the substantive issues in the case should be remitted to the Court of Appeals for its initial consideration; the Board does not disagree with this view. There are serious questions about the remedy the Board has prescribed. As it stands, the Board's order, which involves a massive award of back pay, is punitive as it applies to Darlington. This is the first case in which a back-pay liability extending beyond the date that a business was finally and completely liquidated has been imposed. The amount of the liability is impossible to ascertain, and Darlington, having liquidated, has no possible means of limiting its size. Further, Darlington had reason to rely in this case on the Board's long-established principle of tolling a back pay award from the date of a trial examiner's report favorable to an employer-respondent. The principle was abrogated after the intermediate report in this case and was abrogated with retrospective effect. This should not be permitted.

ARGUMENT

I

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT A COMPANY HAS AN UNQUALIFIED RIGHT PERMANENTLY AND IN GOOD FAITH TO GO OUT OF BUSINESS FOR ANY REASON.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The National Labor Relations Board held in this case that under this section a company commits an unfair labor practice when it completely liquidates itself and goes out of business in good faith, if one of its contributing reasons for so doing is to avoid dealing with a labor union. "A [permanent] plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice." (R. 9).[7]

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[7] The Board contends in its brief that the liquidation of Darlington violated § 8(a)(1) as well as § 8(a)(3) (NLRB Br. pp. 2, 24, 30). For convenience our argument will be stated in terms of § 8(a)(3). The content of the argument, however, applies equally to § 8(a)(1).

The union, but not the Board, now contends that the liquidation also violated § 8(a)(5). (AFL-CIO Br. pp. 4-5). In its decision the Board held that the liquidation violated § 8(a)(5), but this holding was tied to the Board's conclusion that there had been a violation of § 8(a)(3). (R. 18). We believe that this holding does not raise any issues that are not covered in our analysis of the issues arising under § 8(a)(3).

The Court of Appeals rejected this contention. It held that a company has an unqualified right permanently to go out of business for any reason, including the desire to avoid dealing with a labor union. The Court's rationale was as follows:

> "To go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative. The fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee. . . . If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part. A statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity. Consider the consequences of an attempt to punish as contempt a violation of such an order, and its fatal infirmity is revealed: the proprietor would be jailed or otherwise penalized for not reopening a demised business reinstating employees." (R. 1899).

In this Court the Board does not attempt to defend its holding that Darlington, considered as a single employer, committed an unfair labor practice by dissolving its corporate existence and completely liquidating its affairs. Instead the Board relies solely on the "independent" ground of decision, summarily stated in a single paragraph of its opinion, that the liquidation of Darlington was an unfair labor practice because it should be considered as a closing by an employer of one of several plants in reprisal for union activity.

The Board sought to support this ground of decision by reference to that part of its decision dealing with the question of remedy, in which it concluded that Darlington and certain other corporations, considered together, constituted a "single employer."

Although the Board thus attempts to avoid the question whether a corporate employer violates the Act if it dissolves itself and liquidates its operations, that question cannot be so easily evaded. The union at least recognizes that this is so by attempting to defend the Board on the principal ground of its decision. If an employer does not violate the statute by a complete withdrawal from business, then the question whether the employer owns one or several plants is significant only as it bears on the issue whether in fact there has been a final and complete withdrawal and not the adoption of a subterfuge that permits the business to be carried on in some other form or in some other place. If the withdrawal is complete and final and not such a subterfuge, then we submit that it is not an unfair labor practice whether prompted in whole or in part by animus toward a union; and the question whether the employer owns one or several plants is irrelevant.

In the present case the Examiner found that the liquidation of Darlington was final and complete, and that its business was not being carried on in any other form or in any other plant. These findings were affirmed by the Board and by the court below. With the issue of subterfuge thus removed, we submit that this case must ultimately turn on the question that the Board decided in its opinion but that it now declines to argue to this Court.

We shall therefore in the first instance direct this discussion to a proposition that has hitherto been as-

sumed without question, *i.e.*, that the National Labor Relations Act does not forbid an employer to go out of business totally and permanently and does not provide any sanction against an employer for doing so.

A. THE NATIONAL LABOR RELATIONS ACT DOES NOT BY ITS TERMS OR IN ITS POLICY REACH THE COMPLETE AND PERMANENT LIQUIDATION OF A BUSINESS.

In its opinion the Board held that the language of Section 8(a)(3) of the National Labor Relations Act "literally proscribes Darlington's closing of its business in retaliation for the employees' selection of the Union as their bargaining representative. . . . " (R. 16). It saw therefore an "uncomplicated, literal violation of § 8(a)(3)." (R. 10). The union repeats this contention in this Court.[8] (AFL-CIO Br. p. 4). There is no merit to it or to the union's parallel arguments concerning Sections 8(a)(1) and (a)(5).

Since the statute regulates only employers, it can have no application when a person or a business entity withdraws himself or itself from that status by going out of business; certainly the language of the statute does not "literally" apply to such a case. The statute does not define the term "employer" artificially to include persons who once were employers as well as present employers. The Board's only attempted answer in its opinion to this point was that, while the Act does not define an "employer" in any way helpful to its theory, it does provide that "the term 'employee' shall include . . . any individual whose work has ceased

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[8] In referring to contentions made in this Court, this brief will not ordinarily distinguish between the brief of the petitioner Textile Workers Union and that of the AFL-CIO as amicus, since the arguments in the two are designed as a single coordinated whole. We will ordinarily, in this context, refer simply to "the union."

. . . because of any unfair labor practice. . . ." § 2(3), 29 U. S. C. § 152(3). The Board concluded that "Darlington's discharged workers remained employees within the statutory definition. . . ." (R. 11).

We leave to one side the doubt that must arise as to whether the definition of "employee" assists very much in determining who can be the "employer" against whom the strictures of the statute run. The Board's reasoning is circular because its formulation simply begs the question. The issue to be resolved is whether the liquidation of Darlington, and the consequent discharge of its employees, constituted an unfair labor practice; if it did not, then the language of Section 2(3) is inapplicable. The attempt to posit a "literal" violation of the statute is thus logically unsound. More than that, however, the far-reaching issue that is at stake here is not to be resolved by a myopic scrutiny of the words of the statute, but rather with the assistance of an inquiry into Congressional purpose and fundamental policies underlying government regulation in general and the national labor law in particular. Such an inquiry makes plain that the Board in its opinion and the union in its argument here are wrong.

In its preoccupation with the possibility of economic injury to workers discharged because of a plant closing, the Board ignored the basic principle that in our society one has the right to choose, for any reasons sufficient to him, whether to engage in business as an employer. If an individual (or a corporation) chooses to commit his capital, do business and employ workers, he gains the possibility of operating at a profit and making money. The Government imposes various obligations upon him, among which are the obligations contained in the National Labor Relations Act.

These are conditions on being an employer, requirements contingent upon the activity of employing workers. If a businessman finds these obligations too onerous or otherwise not to his liking, he may avoid them, but only at the high price of removing himself from the category of those to whom the law applies by terminating his business and forgoing all the advantages and possibilities that engaging in business creates and perhaps suffering the opprobrium that attaches to one who has failed in business.[9] No one has an obligation to become an employer; neither the Board nor the union would, presumably, argue that an unfair labor practice is committed by one who contemplates entering a business but decides not to do so because of unwillingness to comply with the obligations imposed on employers by the National Labor Relations Act.[10] (This would, however, constitute a "literal" violation of the statute on the Board's reasoning.)

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[9] In his intermediate report the examiner observed:

"Whatever the factors which the Darlington stockholders weighed, corporations will not generally go out of business and liquidate their holdings to avoid dealing with a union. Where such steps are taken, financial loss will normally result and there will certainly follow the loss of profits and of that hope for future profits which motivated the enterprise. (If one thinks of motivation other than hope for profit, satisfaction of that motivation, whatever it be, will be denied as the business is liquidated.) If this does not line the pockets of those discriminated against, no more are they compensated when an employer is unable to pay; and it is not our broad social function to provide compensation and a remedy beyond the provisions of the Act. The fact remains that the situation here will hardly become common." (R. 99).

[10] In Associated Press v. NLRB, 301 U.S. 103, 132 (1937), this Court said:

"The Act does not compel the petitioner to employ anyone. . . ."

There is no reason in theory or in practice why the law should be different for one already an employer who chooses to withdraw from that status.

The Board's interpretation of the law would create an anomaly in the whole pattern of governmental regulation of various types of activity. Such regulation is in the nature of the imposition of conditions on engaging in the activity in question. That is the thrust of the declaration of policy found in Section 1(b) of the Taft-Hartley Act, 29 U.S.C. § 141(b), from which the union seeks, through verbalisms, to draw support for its position (AFL-CIO Br. pp. 5-6).[11] The declaration states it to be the Congressional purpose and policy "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce. . . ." This necessarily means that there are correlative duties imposed on the parties to the employer-employee relationship—conditions, as we have said, upon the undertaking to be an employer (or employee). There is nothing in the statement of policy or elsewhere in the statute that purports to impose an obligation to enter into the relationship or remain in it. Except perhaps in the plainly distinguishable case of some public utility regulation, nowhere in the entire body of our law does there exist a type of governmental regulation that not only imposes conditions on engaging in a particular activity but in addition requires the activity to be engaged in

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[11] The union refers to the statutory purpose of promoting the full production of articles and commodities for commerce and the full flow of commerce, and asserts that this purpose will not be promoted by permitting employers to shut down their plants for allegedly forbidden reasons. Nor will that purpose be promoted by any plant shutdown, but the statute clearly does not reach all business liquidations.

or, once undertaken, to be continued, in order that the regulation may have as wide an application as possible.

If a lawyer or a doctor finds intolerable or even uncongenial the obligations imposed on him by law in the pursuit of his profession, no one questions his right to cease his practice in order to avoid them. If ordinances impose restrictions on the uses to which real property can be put, then it is axiomatic that a landowner may escape those restrictions by selling his property to someone else. If a liquor dealer finds it offensive to be compelled to collect a liquor tax when he sells his products, he may avoid that obligation by going out of business. A restaurant that considers municipal health or fire regulations vexatious may escape them, insofar as they apply only to restaurants, by withdrawing itself from that category and turning to some other business. As yet unquestioned is the right of an individual to avoid income taxes by ceasing to earn taxable income.[12] It may be predicted with some confidence that, if and when the issue reaches the courts, a proprietor of a place of public accommodation will not be held to have violated the Civil Rights Act of 1964 if he chooses to abandon his business completely rather than to comply with the obligation to serve all persons without discrimination.[13]

Such analogies could be multiplied, indeed from

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[12] During the argument of the present case before the Board in September 1957, Member Murdock (who was no longer a Board member by the time of the final decision) drew this analogy to the right of an employer to go out of business.

[13] The Court of Appeals of Maryland recently said of that state's public accommodations law: "The duty not to discriminate which the legislature has imposed upon restaurants such as the one which the appellant owns is a condition of his carrying on that business, not a requirement that he stay in it. . . . [I]f the appellant feels

every area where specific types of private activity are regulated by Government. The right to abstain from a private, regulated activity in order to free oneself from the regulation thereof is simply one of the fundamental rights of free men in a free society, and we know of no case prior to this one where abridgment of that right has even been suggested.

It is true that in legislation regulating public utilities there is sometimes a requirement that regulatory approval be had before service is abandoned.[14] Control of abandonment of service is a concomitant of the limitation of entry and the consequent monopoly or semi-monopoly position that a licensed utility enjoys under the law. Moreover, even with respect to public utilities the control over discontinuance of business is not absolute. For example, a state may not, consistently with the Fourteenth Amendment, prevent a utility from discontinuing its business when the business is being conducted at a loss. *Brooks-Scanlon Co.* v. *Railroad Comm'n,* 251 U.S. 376 (1920) (Holmes, J.); see also *Phillips* v. *Nelson,* 108 F.2d 725 (10th Cir. 1939).

In the ordinary case of a private business not affected with a public interest, and in the particular case of this marginal textile mill, abridgment of the right to withdraw from an activity serves no useful purpose in effectuating the policies that governmental regulation seeks to achieve. The National Labor Relations Act was not designed to compel persons to become or remain employers; it was designed to insure

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the condition too onerous, he is under no obligation to continue in an occupation lawfully regulated in the public interest." Barnes v. Maryland ex rel. Pinckney, No. 163, Md. Ct. App., Nov. 17, 1964.

[14] *E.g.*, Federal Aviation Act § 401(j), 49 U.S.C. § 1371(j); Interstate Commerce Act § 1(18), 49 U.S.C. § 1(18).

that those who choose to become and remain employers act in accordance with certain obligations in dealing with their employees.

B. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT INTEND TO RESTRICT A COMPANY'S RIGHT TO GO OUT OF BUSINESS.

Clear and unequivocal evidence that Congress intended that an extraordinary restraint be placed upon the usual privilege of anyone to go out of business is the minimum that would be required to authorize the Board to construe the statute as imposing such a restraint. No hint of any such Congressional intent is to be found in the legislative history of the National Labor Relations Act. In all the many hundreds of pages of hearings, reports and debate that preceded the enactment first of the Wagner Act and twelve years later of the Taft-Hartley amendments, there is not the slightest intimation that Congress or any member of Congress understood or intended that any provision of the Act could have the result of abridging an employer's right to go out of business at any time and for any reason he chose.

Not only is there a complete want of evidence that Congress did so intend, but also there is affirmative, unambiguous evidence that it did not. At one point during the debate in the House on the bill that became the Wagner Act, Representative Griswold of Indiana, a ranking Democratic member of the Labor Committee, which had reported the bill, was asked by Representative Taylor of Tennessee, "Is there anything in this bill to prevent an operator from closing his plant?" He answered unequivocally: "There is nothing in the bill to keep an operator from closing his plant." 79 Cong. Rec. 9682 (1935).

Senator Walsh, Chairman of the Senate Committee

on Education and Labor and a principal sponsor of the bill, made the following declaration as to "fundamental rights" that remained untouched by the legislation:

> "Mr. President, there are some *fundamental rights* an employer has, just as there are rights an employee has. *No one can compel an employer to keep his factory open.* No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in additional to those he sees fit to hire. So with an employee; no one can compel him to work, no one can compel him to go on strike, no one can compel him to leave his work.
>
> *"No one can keep an employer from closing down his factory and putting thousands of men and women on the street.* So in dealing with this bill we have to recognize those *fundamental things,* and we have not gone into that domain. All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly processes of collective bargaining." 79 Cong. Rec. 7673 (1935). (Emphasis added).

On two occasions during the Senate Committee hearings that preceded passage of the Wagner Act, employers testified that, if the legislation were enacted and they were compelled to deal with labor unions, they (or others) would go out of business rather than incur that burden. If anyone on the committee had believed that a cessation of business for that reason would itself be an unfair labor practice under the statute, he

would naturally have so stated at that point. In neither case did any senator give such an indication. *Hearings Before the Senate Committee on Education and Labor on S. 2926,* 73d Cong., 2d Sess. 414-15, 665 (1934).

This legislative history is compelling both in what it says and in what it does not say. The question of permanent plant closings was one of which Congress was well aware, and on several occasions both congressmen and witnesses referred to the right of employers to close their plants as an axiomatic one which was untouched by the bill and which might be exercised to avoid the consequences of the bill. It never occurred to anyone, other than Representative Taylor, that the bill might be construed to interfere with or abridge an employer's right to go out of business. And when Representative Taylor raised that possibility, the suggestion was instantly and flatly repudiated by one of the sponsors of the bill.

C. THE DECIDED CASES SUPPORT THE VIEW OF THE COURT OF APPEALS THAT THE NATIONAL LABOR RELATIONS ACT DOES NOT RESTRICT AN EMPLOYER'S RIGHT TO GO OUT OF BUSINESS.

The Board's holding that an employer commits an unfair labor practice in some circumstances by going out of business is without support in judicial precedent. The Board has conceded as much. It said in its opinion that "there is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." (R. 15). Such judicial consideration of the subject as does exist is similar to the legislative history in that it assumes the right as one beyond question.

This Court has indicated that such an assumption is proper. In *Southport Petroleum Co.* v. *NLRB,*

315 U.S. 100 (1942), the Board had ordered reinstatement of certain employees found to have been discriminatorily discharged. The company offered to prove that after the issuance of the order it had gone out of business. The Court rejected the offer as not comprehensive enough to show whether the cessation of business had been complete and bona fide but made clear that such a cessation would be sufficient to eliminate the liability. The Court said:

> "Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the offending employer of the refinery to the employment of which the illegally discharged employees were to be restored. Such operation might have continued under the old business form or under a disguise intended to evade this provision. * * * Whether there was a bona fide discontinuance and a true change of ownership—*which would terminate the duty of reinstatement created by the Board's order*—or merely a disguised continuance of the old employer, does not clearly appear, ..." *Id.* at 106. (Emphasis added.)

In the Court's view, then, the question was not the company's motive in going out of business, but whether it really had gone out of business. This, to be sure, was a compliance case, but there was no suggestion that the cessation of business could itself be an unfair labor practice if motivated by a desire on the part of the company to avoid its obligations to its workers under the law, although the whole atmosphere of the case and the opinions strongly suggested that such a motive was present. And since the Court expressly held that

dissolution terminates the duty to comply with Board orders based on prior unfair labor practices, implicit in the decision was the Court's view that dissolution, however motivated, removes an employer from the ambit of the statute altogether, or at least from the impact of remedial orders thereunder. The cases in the lower federal courts are to the same effect. *NLRB* v. *Grace Co.*, 184 F.2d 126, 130 (8th Cir. 1950); *NLRB* v. *Caroline Mills, Inc.*, 167 F.2d 212, 214 (5th Cir. 1948); *NLRB* v. *Tupelo Garment Co.*, 122 F.2d 603, 606 (5th Cir. 1941); *Atlas Underwear Co.* v. *NLRB*, 116 F.2d 1020, 1023 (6th Cir. 1941); *Phillips* v. *Burlington Industries, Inc.*, 199 F. Supp. 589, 591 (N.D. Ga. 1961).

In the present case the Board has taken pains in its opinion and now in its brief to attempt to distinguish *NLRB* v. *New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954). There the court declared:

> "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business, or to actually dispose of his business to another, for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing or true and bona fide change in ownership has occurred. No one can be required to stay in private business, and no one can be prevented from permanently closing or abdicatingly selling such a business. . . . *Cf. Southport Petroleum Co.* v. *N. L. R. B.*, 315 U.S.

> 100, 106. No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abidicating sale of the enterprise." *Id.* at 914.

The Board argues improbably (R. 14-15; NLRB Br. p. 37) that the language just quoted was contradicted by the court's actual holding. This is not so. The court did agree with the Board in its finding that a temporary shutdown of a plant, prior to the permanent going out of business, was an unfair labor practice. *Id.* at 912. The court made the statements we have quoted in holding that a subsequent permanent closing prevented any relief against New Madrid for the temporary shutdown other than back pay up to the time of the permanent closing. *Id.* at 915.[15]

A temporary shutdown was also what was involved in the one court case that the union cites for the proposition that "it is an unfair labor practice for an employer to shut down . . . his entire operation." (AFL-CIO Br. pp. 6-7). The case is *NLRB* v. *Norma Mining Corp.*, 206 F.2d 38 (4th Cir. 1953), decided by the same court that rendered the decision on review here, and relied upon also by the Board in its opinion. (R. 15-16).[16] Of course, a temporary shutdown, which may fairly be equated with the traditionally anathematic lockout, may constitute an unfair labor practice, but

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[15] Thus the holding was in square conflict with the Board's order in the present case, which awarded back pay beyond the time of the permanent closing.

[16] Both the majority and dissenting judges in the Court of Appeals distinguished *Norma Mining Corp.* as involving a temporary shutdown. (R. 1899, 1910).

it is a very different thing from a complete, good faith, permanent liquidation of a business.

The other cases cited for the view that it may be an unfair labor practice to go out of business similarly involved a temporary rather than a permanent shutdown, a runaway plant or some other kind of "disguised discontinuance" that did not affect the operation of an entire plant or the continuance of the business itself. They are treated in Part III of this argument, where we address ourselves to the Board's proposition that what may have been lawful if undertaken by Darlington alone was unlawful by reason of Darlington's relationship to some other textile corporations. The crucial difference between all these types of cases and the present situation is that in those cases the employer was attempting to have its cake and eat it too: to avoid dealing with the union while at the same time continuing its business and preserving the opportunity to make a profit therefrom. In none of these cases had the employer decided to accept the ultimate consequence of its unwillingness to deal with a labor union, that is, the cessation of its economically profitable activities altogether. The inability of the Board to recognize this crucial distinction—to appreciate that the progression from a temporary shutdown or a plant transfer to a permanent discontinuance of business is not merely another step or a difference in degree but presents a qualitatively different situation altogether—is a fundamental error.

A similar manifestation of inability to draw legally relevant distinctions is found in the Board's simplistic argument that, since threats to close a plant constitute an unfair labor practice, the actual closing must likewise be illegal because it would be irrational to pro-

scribe threats to take action that is not itself proscribed. (Br. pp. 31-32). An answer to this argument lies in the statutory scheme itself since such threats made prior to an election may well have a coercive effect on a continuing employer-employee relationship, while a complete and permanent liquidation of and withdrawal from business cannot. See *Atlas Underwear Co.* v. *NLRB*, 116 F.2d 1020, 1023 (6th Cir. 1941).

The Board itself has recognized that a threat made during the course of an election campaign may have unlawful coercive effects even though the act threatened does not violate the statute. The Board has ruled, for example, that a party does not violate the Act by resorting to the courts for an injunction, even if its motive was to interfere with employees' statutory rights, but that a threat to institute a lawsuit can be violative of Section 8(a)(1), *Clyde Taylor Co.*, 127 N.L.R.B. 103 (1960). The Board has commonly taken the position that in organizing drives anticipatory statements by an employer of his position with respect to various bargaining matters may constitute unlawful interference, even though subsequent adherence to those positions is perfectly proper. It has thus found unlawful interference in an employer's announcement to employees in an election campaign that he would not bargain with a union because its majority status was predicated upon an inappropriate unit, *Lord Baltimore Press*, 142 N.L.R.B. 328 (1963),[17] and that he would, if the union won an election, no longer con-

[17] Indeed, the distinction between threats and their effectuation is highlighted by the *Lord Baltimore* decision, where the Board, without rejecting the employer's legal position, announced that "we can only view this kind of statement of legal position as a threat. . . ." 142 N.L.R.B. at 329.

tinue certain benefits, *James Hotel Co.*, 142 N.L.R.B. 761 (1963). In these situations it is clear that the employer had the legal right subsequent to the election to carry out the actions threatened.

D. THE ABSENCE OF A PERMISSIBLE REMEDY RATIONALLY RELATED TO THE SUPPOSED VIOLATION DEMONSTRATES THE ERROR OF THE BOARD'S CONSTRUCTION OF THE STATUTE.

In the case of a violation of Section 8(a)(3) the purpose of a Board order is to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). The Board was enabled in this case to fashion a remedy it considered adequate by that standard only by a factor that so far as the problem now under discussion is concerned—whether an employer has the right to liquidate a business for whatever reason may move him—was wholly fortuitous.

The Board found itself in a dilemma:

> "The unusual circumstances of this case . . . have made it more than ordinarily difficult to decide on the period that the back-pay award should cover. The Darlington plant has been closed and there is no immediate prospect that it will be reopened. The Board's remedy of reinstatement with back pay to run until such time as reinstatement has occurred, which is the Board's customary remedy where an employer has discriminatorily discharged his employees, is thus wholly impractical where the closed plant only is taken into consideration." (R. 22).

The Board therefore ordered Darlington "to provide back pay until the discharged employees are able to obtain substantially equivalent employment" (R. 22), although it considered that "this limited redress for the unfair labor practices found is clearly inadequate." (R. 23). The Board believed that it was saved from this inadequacy by its discovery that other corporations together with Darlington formed a "single employer" and its conclusion that these other corporations could therefore be ordered to offer employment to Darlington's former workers.

If there had been no related corporations, however, even though on the Board's view the liquidation of Darlington would equally have constituted an unfair labor practice, by the Board's own admission the only remedy would have been "clearly inadequate." Given the scope of the Board's remedial powers, this admitted inability to find an adequate remedy for the unfair labor practice thought to be committed by a corporation in liquidating itself casts the gravest doubt on the soundness of the Board's conclusion that there is such an unfair labor practice.

To carry the matter a step further: on the Board's theory that Darlington's liquidation constituted an unfair labor practice, obviously the most effective remedy to eradicate the consequences of that conduct would be (in addition to a back-pay order) a requirement that Darlington be reconstituted and reopen a textile plant in the City of Darlington. Yet the Board never even considered ordering this, and for good reason: a requirement that individuals invest their capital in a certain enterprise and enter into a particular business at a specified location, even if they had previously been so engaged, is so extreme and

impractical and raises such grave constitutional problems that it is unlikely that any court would sustain it.[18]

In its purely financial impact the back-pay order that the Board did issue, which would entail payments that could easily amount to several million dollars,[19] would be far more onerous than the reconstitution of Darlington, which had a capital value, based on stock prices, of only some $2,100,000 in 1956. (R. 437, 439).[20] But in terms of its unprecedented coercive impact on the right of persons and companies to engage or not to engage in business as they choose, the shock of an order requiring reconstitution of the business is much greater. If the Board's decision in the present case were allowed to stand, it would have to be applied in cases where there were no even arguably "affiliated" corporations still in existence to assume the burden of offering jobs to discharged employees. In such cases the Board would be faced with the choice either of ordering reconstitution of the business or of contenting itself with a remedy that by its own admission is "clearly inadequate." The Board's solution in the present case is simply an attempt to disguise the fact that, on analysis, an order that a dissolved business be reconstituted is no more drastic or shocking than a holding that that business violated the law by its dissolution. Our legal system has no place for either.

Another factor, involving both the holding of illegality and the remedy, underlines the unsoundness

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[18] See pp. 74-76, *infra*.

[19] See p. 77, *infra*.

[20] Total assets minus liabilities were $3,760,000. (R. 441).

of the Board's result. The liquidation of a business is not, and was not in this case, the act of the corporation itself; it is the act of the shareholders. A company cannot logically be held liable for its own dissolution. So long as a corporation is in existence, it can act only through its agents; there are therefore persons—usually its officers—for whose acts the corporation is legally answerable. But the fundamental acts of bringing a corporation into being and dissolving it are not the acts of the corporate body, but of the shareholders.[21]

Even if the corporation could be held liable for this act of its shareholders, absurdities become apparent when it is remembered that the Board's test of legality is one of motive. Must each shareholder be examined as to what his motive was? Suppose it appears that different shareholders voted as they did for different reasons or different combinations of reasons. If a majority voted for liquidation, but only a minority

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[21] The Board may suggest, as it did below in an argument addressed to a somewhat different point, that Darlington in any event committed unfair labor practices because it discharged its workers not all in one day, but gradually over a period of several weeks; only the discharges on the last day of production, the Board held, partook of the nature of a liquidation of the business. (R. 11, n. 22). This argument ignores the patent fact that the discharges, though periodic, were all made pursuant to a plan and decision to liquidate. To make the result turn on whether the company completed its liquidation in the course of a single day or not would be a triumph of form over substance. As in Mount Hope Finishing Co. v. NLRB, 211 F.2d 365, 372 (4th Cir. 1954), "the charge that the Company locked out and discharged its employees in order to evade its obligation to bargain with the union is merely incidental to the charge that the plant was closed for this purpose and falls for the same reason."

(though a majority within the majority) were found to have acted from anti-union motives, would the "corporation's" act therefore be illegal? And since the impact of any remedial order issued by the Board falls on the shareholders, should not only those shareholders who voted for the dissolution be penalized? And what of those shareholders who may establish that, while they voted for the dissolution, they did so for non-discriminatory motives? One of the many insidious results of the Board's decision is that a shareholder may find himself penalized, his capital destroyed, neither because of his own acts nor even his own motives, nor because of the acts of his company's authorized representatives or of his fellow shareholders, but rather because of what the Board concludes were the *motives* of his fellow shareholders.

These difficulties cannot be ignored simply because in the present case the Board chose to confine its attention to a particular group of stockholders which it described as "the Milliken family." If a company can really violate the law because its shareholders decide on its dissolution, these problems will some day have to be faced; the difficulty of resolving them logically and equitably should at least make the Court hesitate before adopting the Board's position. Indeed, even in the present case there are minority shareholders, including some who voted against the dissolution, whom the Board would penalize equally with those whose motives it views as rendering the dissolution illegal.

II

THE BOARD ERRED AS A MATTER OF LAW IN HOLDING THAT DARLINGTON WENT OUT OF BUSINESS FOR DISCRIMINATORY RATHER THAN ECONOMIC MOTIVES.

In holding that Darlington committeed an unfair labor practice by liquidating itself the Board drew a distinction between economic or business reasons for management decisions that are unrelated to labor unions, on the one hand, and, on the other, economic and business reasons that in some way are related to the presence or conduct of labor unions. The Board held that any business decision involving the discharge of workers that is based in part on reasons in the second category is illegal. The distinction and the holding have no warrant in the statute.

Darlington contended before the Board that there were legitimate economic reasons for its liquidation and that these were acted upon. There is no doubt that if that was the case Darlington committed no unfair labor practice by liquidating.[22] Darlington's argument was based on the following facts of record, which are not challenged by the Board.

A number of economic factors, existing prior to and unrelated to the unionization campaign, created grave and increasing doubt whether Darlington could continue to operate as a viable concern. (R. 411-21, 461-64). About a month before the union election, Darlington learned that during the then-current year the company's books would show a substantial deficit for the first time since the 1930's. (R. 427, 443). Thus at

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[22] *E.g.*, NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962).

the time the union appeared on the scene Darlington was at best a marginal operation; any increase in costs would make it impractical for it to continue to do business, and before the arrival of the union the directors had considered the possible necessity of liquidation for business reasons. (R. 461). The examiner recognized that "the factors cited were sufficient to support a decision to terminate operations; certainly it cannot be said that such a decision could not reasonably, or even unreasonably but credibly, be based on those factors." (R. 65).

One of Darlington's principal problems for several years had been to obtain cooperation from its workers in instituting more modern and economical methods of work assignment. This program had met with resistance from some of the employees, which had given the management considerable concern. (R. 402-09, 481). The union campaigned primarily on its promise that it would prevent the company from carrying out the work assignments and procedures it believed necessary, and the company reasonably concluded that the advent of the union would seriously impede its work-assignment program. (R. 422-23, 1275-80). The success of the union's representation campaign, following hard on the heels of the discovery that Darlington would incur substantial losses in that year, caused the management to review Darlington's total economic picture and prospects. (R. 267, 423-28, 457-58, 469, 474-77). This review led to the conclusion that in view of all the adverse economic factors, including majority support of a union pledged to impede the company's work-assignment program and to obtain higher wages, Darlington could no longer continue to operate profitably. (R. 254, 263, 267, 291-92, 464, 469-70). The

recommendation of the directors and the decision of the shareholders was therefore to liquidate. (R. 429-30).[22]

The Board's answer to all this was that Darlington's pre-existing economic plight was irrelevant because it appeared that the decision to liquidate would not have been reached at that particular time "but for" the victory of the union. (R. 8). It continued,

> "Moreover, even assuming, as the Respondent contends, that the 6 genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's action was no less unlawful. A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice." (R. 9).

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[22] Petitioners attach great importance (see, *e.g.*, NLRB Br. p. 8) to the testimony of one witness that Roger Milliken, when asked why the mill would remain closed when 83% of the workers had signed a petition asking to go back to work with or without a union, declared, "as long as there was 17% of these hard-core labor people here, I refuse to run the mill." (R. 268). In fact this statement, if made, actually refutes the theory that Darlington was closed because of management's unwillingness to deal with the union. If only 17% of the workers adhered to the union, the union stood ultimately to lose its certification and the company would be under no obligation to deal with it. Yet, according to this testimony, Roger Milliken was unwilling to keep the plant open even though freed of the union. The testimony, therefore, supports the conclusion that Milliken's reason for proposing liquidation was not opposition to the union as such, but rather his belief that the plant could not be operated profitably if any substantial portion of the labor force was unwilling to cooperate with the work assignment program.

Thus the Board held that there is no such thing as an "economic" reason for liquidation that is related to union activities—that a company has no right to conclude from all the circumstances, including the conduct and the promises of the particular union in question, that the certification of that union is bound to result in union demands or action that would intolerably raise the company's costs or cause a crippling strike. In the Board's words, "When an employer discharges its employees [by liquidating its business] for selecting a union to represent them, the motivation is not 'economic' in the sense contemplated by the Act—notwithstanding the employer's belief that it could not afford to pay increased wages that the union representative might demand." (R. 8).

These views of the Board cannot be sustained under the Act. The advent of a union can in certain circumstances be an "economic" factor that may form the basis, particularly when combined with other factors, for a corporate decision that would not violate the Act even were the decision not one protected by a company's absolute right to go out of business for any reason it chooses. The Court of Appeals for the First Circuit has so held in *NLRB* v. *New England Web, Inc.*, 309 F.2d 696, 701 (1st Cir. 1962). In reversing a Board decision that the termination of a business in the face of unionization was an unfair labor practice, the court said, "assuredly among those factors which would induce a 'legitimate' business judgment to close operations, few can exceed financial distress," and "certainly the company could reasonably expect the advent of the union to affect its already precarious cost picture."

The very recent case of *NLRB* v. *Neiderman*, 334

F.2d 601 (2d Cir. 1964), is also illustrative of the point. There the court affirmed the Board's finding that the employer had committed unfair labor practices in the course of a union representation campaign. About three weeks after the employer learned that a majority of the employees had joined the union, the company determined to cease operations and dissolve itself. The court reversed the Board's holding that the dissolution violated Section 8(a)(3) of the Act. Without reaching the question whether a company has an absolute right to go out of business, the court held that the dissolution of the business was "primarily predicated on valid economic considerations" and thus was lawful. 334 F.2d at 604. The sole economic reason involved was the company's unwillingness or inability to pay increased wages which it had been informed were those customarily demanded by the union.

The courts of appeals have uniformly held that in deciding on such steps as plant transfers and the elimination of auxiliary departments—not involving the right to close down a business—an employer may consider the anticipated economic consequences of unionization, either alone or together with other economic factors. *NLRB* v. *Kingsford,* 313 F.2d 826 (6th Cir. 1963); *NLRB* v. *Rapid Bindery, Inc.,* 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc.* v. *NLRB,* 292 F.2d 317 (7th Cir. 1961); *NLRB* v. *Lassing,* 284 F.2d 781 (6th Cir. 1960); *cert. denied,* 366 U.S. 909 (1961); *NLRB* v. *R. C. Mahon Co.,* 269 F.2d 44 (6th Cir. 1959); *NLRB* v. *Adkins Transfer Co.,* 226 F.2d 324 (6th Cir. 1955); *NLRB* v. *Houston Chronicle Pub. Co.,* 211 F.2d 848 (5th Cir. 1954); *Mount Hope Finishing Co.* v. *NLRB,* 211 F.2d 365 (4th Cir. 1954).

These decisions are thoroughly consonant with the Act. The reasonably expected consequences of the presence of a specific labor union as evidenced by its demands, its past performance or promises made by it to the workers, are economic facts which any responsible employer should and would consider in reaching basic management decisions. "The Board's position appears to be that a move by management when that move is required for sound business reasons is nevertheless an unfair labor practice if the move is accelerated or reinforced by contemporaneous difference with a union. This position is not supported by the language of the Act or by the decisional law interpreting that language." *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170. 174 (2d Cir. 1961).

Petitioners attempt to distinguish decisions cited and discussed above on the ground that in those cases the courts had found that the discontinuances were motivated by other factors than anti-union reasons. This is a mere semantic distinction. What the Board characterizes as an unlawful and anti-union motive in this case was precisely the motive that was present in these other cases, *i.e.*, a recognition that in an enterprise already beset by economic difficulties the problem of reducing costs was predictably aggravated by the advent of a union committed to a program of demands for higher wages and less flexible job assignments.

Even if the subjective motivation for a decision to withdraw from business can ever be a proper basis for determining whether an unfair labor practice has been committed, the Board is wholly unrealistic when it draws a rigid dividing line between economic or business reasons on the one hand and reasons con-

nected with labor unions on the other, and holds, as it expressly did in this case, that a management decision is tainted by illegal anti-unionism if it is in any degree influenced by consideration of the activities, threats, promises or demands of a union as an economic factor.

There is no sound reason flowing from the national labor policy why an employer should be compelled to ignore these important parts of the total business picture in reaching crucial management decisions. The rule as to motive announced and applied by the Board in this case is so wholly subjective and so susceptible to manipulation by verbalisms that its application and enforcement would give rise to serious practical problems. A rule of this character would inevitably have the effect of penalizing those who are candid and forthright and advantaging those who are devious and disingenuous. Such results are always threatened when subjective motivation is unduly exalted as the basis for holding identical objective acts legal or illegal. The danger is particularly acute when, as here, the motive proscribed is a legitimate one that businessmen cannot reasonably be expected to eschew.

These considerations, which apply to such decisions as plant removals or the discontinuance of auxiliary departments, are especially forceful when the complete and permanent liquidation of a business is in question. It would be a quixotic employer who found the presence of a labor union, entirely apart from its reasonably anticipated economic effects, so personally offensive on moral, aesthetic or other grounds that he would rather close down his business altogether than tolerate it. When the liquidation of a business is based in any part on the advent of a labor union, as a matter of

common sense the presumption is overwhelming that it was the actual or reasonably anticipated economic consequences of unionization, rather than mere vindictiveness, which was decisive. The proof shows that such was the case here.[24] In this connection it is significant that although Darlington attempted to sell its operation as a whole it developed that a larger price could be obtained by selling the plant and equipment piecemeal. This circumstance strongly suggests that prospective purchasers regarded the advent of the union as a relevant economic consideration.

The Board's holding that Section 8(a)(3) is violated by any consideration of the presence of a labor union as a factor in a decision to liquidate must be rejected. The decision of the Court of Appeals therefore should be affirmed even if this Court holds that a decision to liquidate is not an unqualified prerogative of an employer. However, if the Court believes that the question whether Darlington's action was legal involves issues of fact concerning the relative importance of the various motives that were present, then the Court should remand the case to the Court of Appeals with a direction to apply to the facts the legal standards indicated in this section of the argument.

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[24] Certainly, at a minimum, a decision so drastic in its effect on the employer as a decision to liquidate is in the category of "conduct which on its face appears to serve legitimate business ends," i.e., would not be engaged in were it not for a compelling business reason, and which therefore can only be found to be an unfair labor practice upon a "showing of an intent to encroach upon protected rights." NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). A liquidation and withdrawal from business is of a different order from the device of giving striker replacements superseniority in a continuing business. It was the latter practice that was involved in the *Erie Resistor* case and which the Court thought had an "inherently discriminatory or destructive nature. . . ." *Ibid.*

The Court of Appeals did not pass upon the question, merely expressing its willingness to accept *arguendo* the Board's conclusions that anti-union motives predominated and that, even if other reasons played a part, if unionization also contributed to the decision to close the plant "then the contribution of this factor may be considered as responsible for the cessation." (R. 1899). The evidence that might or might not support the Board on either branch of its holding has not been judicially evaluated as to its substantiality.

III

DARLINGTON'S ALLEGED RELATIONSHIP TO OTHER CORPORATION CANNOT MAKE ITS LIQUIDATION, IF LAWFUL STANDING ALONE, AN UNFAIR LABOR PRACTICE.

The Board's examiner, upon its direction, conducted a prolonged inquiry into whether some twenty other corporations whose ultimate majority ownership was in the hands of various members of the Milliken family constituted a "single employer" with Darlington. He found, upon an exhaustive analysis of the evidence he received, that there was "clearly" no "single employer." (R. 117-227).[25] The Board reversed. It held that the companies, only one of which in addition to Darlington was even a party to the proceeding, did constitute a single employer and were therefore liable for remedial action on account of Darlington's unfair labor practices.

The Board also found in the relationship between Darlington and the Milliken corporations an additional reason for holding Darlington's liquidation il-

[25] "Clearly (in this situation I do not hesitate to use the term) no single employer status has been shown here." (R. 194).

legal. The Board reached this conclusion in one brief paragraph (R. 18):

> "There is, moreover, independent reason for rejecting the contention that Darlington had an absolute right to close down its mill and discharge its employees. As will appear below, Darlington was but one constituent part of a single entity, consisting of Deering, Milliken and Company and its affiliated corporations. Thus we have here the closing of a single plant of the several in the one entity because of union activity, conduct clearly proscribed by the Act.[81]
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> "[81] *N.L.R.B.* v. *Norma Mining Corporation*, 206 F.2d 38, 41-42 (C.A. 4)."

We submit that for the reasons set forth below Darlington's relations with other corporations cannot furnish any basis for the holding that in the liquidation of Darlington there was a violation of the Act.

A.

The Board erred in its assumption that, if Darlington and the corporations found to be related to it are shown to have constituted a single employer, the case becomes equivalent to those in which employers have been held liable for such conduct as plant transfers or the elimination of auxiliary departments when such conduct had a discriminatory purpose. Even if Darlington were but one among several textile plants operated by what was indubitably a single employer, the permanent and complete closing of one of those plants, without the transfer of its business to any of the others, would still remain in substance the complete liquida-

tion of a business and could be carried out for any reason whatever. In such a case, the fact that the owners of the business also owned other businesses (or other "parts" of the same business; the distinction is only verbal) is irrelevant. The liquidation would still possess the characteristics of a complete cessation of a business (or of "part" of a business), involving withdrawal of the capital invested therein and the abandonment of the attempt to make a profit therefrom. If an employer operated both a textile mill and a bicycle factory, his ownership of the bicycle factory would not render illegal his closing down the textile mill if it would otherwise be legal. And it should make no difference that both his enterprises might be textile mills.

The permanent closing of a plant and the liquidation of the corporation owning it have no determining characteristics in common with any situation that has been held an unfair labor practice. In its decision the Board relied solely on *NLRB* v. *Norma Mining Corp.*, 206 F.2d 38 (4th Cir. 1953). That case did not involve the closing of a plant and the sale of its equipment, much less the liquidation of a corporation, but rather a cessation of mining operations at a particular mine where the employer continued to own the mining rights. There was nothing to prevent mining from being resumed as soon as the union had been disposed of, and the court strongly implied that the employer was in fact planning to do precisely that. When the present case was before the Court of Appeals for the Fourth Circuit, which had decided *Norma*, both the majority and dissenting opinions authoritatively distinguished *Norma* as involving only a "temporary intermission"

of operations, not a permanent shutdown. (R. 1899, 1910).[26]

In this Court petitioners cite, in addition to *Norma*, certain other decisions in the courts of appeals which they assert support their position.

The Board recognizes the factual distinctions between the bulk of the cases it cites and this case. Thus it speaks, citing cases for each clause in its discussion, of "the discrimination which occurs when a plant is temporarily closed so as to discharge all its employees and replace them with non-union labor; when an operation is shut down preparatory to transferring its functions to a non-union division of the same company, or to subcontracting the work to an independent employer."[27] (NLRB Br. p. 34). It urges that the "discrimination" in these cases "is the same in principle" as in the case of a permanent shutdown of the Darlington mill, although it acknowledges in a modest understatement that "it may differ slightly in its impact upon the employer. . . ." (*Ibid.*). The proposition should properly be turned around. It is because of the difference in impact upon the employer that a distinction exists between situations in which there is

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[26] The union admits that the *Norma* shutdown was temporary. (AFL-CIO Br. pp. 7, 9).

[27] One of the cases cited by the Board as falling in the last category is NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962). In fact that case did not involve a transfer of work to "an independent employer." There a manufacturing company, without curtailing in any way its manufacturing operations, simply transferred to another company *under the same management and control* the auxiliary function of transporting its manufactured goods to purchasers. The dissenting judges in the court below asserted that this decision was "controlling on the legal issue here" (R. 1910), apparently without recognizing the essential difference between the facts there involved and the facts in the present case.

a permanent and complete withdrawal from business, or from a major discrete and self-sustaining part of a business, and situations in which the employer, through one artifice or another, is simply continuing what is essentially the same business in another form or in another place. This difference in impact, as we have pointed out above, is one of the reasons that requires the conclusion that the final and complete liquidation of an entire business, regardless of its motive, does not violate the statute. The same principle should apply where the closing of one of several plants, each a major self-sustaining economic unit, is bona fide, complete and permanent, and does not involve a transfer of the business to another plant under the same ownership and management or some other artifice to retain the benefit of the business without the burden of unionization.

The union is not so careful or discriminating as the Board in discussing the facts involved in the decisions of the lower federal courts. It cites certain cases as involving permanent withdrawals from business which in fact did not involve such withdrawals or in which there were additional relevant facts that distinguish the cases from the situation here presented.[28]

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[28] For example, the union describes NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952), as a case involving the permanent closing of one of several plants. (AFL-CIO Br. p. 7, n. 8). The Board properly states that *Wallick* was a case of a shut-down of an operation "preparatory to transferring its functions to a non-union division of the same company." (NLRB Br. p. 34 & n. 29). Williams Motor Co. v. NLRB, 128 F.2d 960 (8th Cir. 1942), not even cited by the Board in this part of its argument, is described by the union as involving the permanent closing of a part of a business. This is a half truth; the case in fact is a classical instance of an employer ridding himself of three union members by discontinuing their department and contracting the work out.

There are only two cases cited in the briefs of petitioners that are even arguably relevant to the issue presented here. These are *NLRB* v. *Savoy Laundry, Inc.*, 327 F.2d 370 (2d Cir. 1964), and *NLRB* v. *Missouri Transit Co.*, 250 F.2d 261 (8th Cir. 1957). In neither of these cases was the issue here presented squarely raised and discussed by the court because in each case the employer defended on the ground that his actions were prompted by legitimate economic considerations and not by animus against the union.

Neither case involved the permanent and complete liquidation of a part of a business that was comparable in any way to the complete and permanent liquidation that took place here by reason of the dissolution of Darlington. The facts in the cases do not support the Board's assertion that they involved "the discontinuance of major phases of the employer's business." (NLRB Br. p. 38). In *Savoy Laundry* there was in a real sense no permanent or compete withdrawal from any discrete part of the business. There the employer had conducted an integrated laundry business, a part of which was a wholesale shirt laundry operation. Because of union activities the employer, without withdrawing completely from the wholesale shirt laundering operation, simply reduced the volume of that operation and used the reduction as an excuse for discharging employees who were active in the unionization campaign. Since the employer was still in the wholesale shirt laundry business and since it had sold no equipment, there was no physical bar to its resumption of dealings with the customers whose work it had declined.

In the *Missouri Transit* case the employer was engaged in conducting an interstate bus service between a point in Missouri and a point in Iowa. It also operated over a segment of that route a shuttle bus service

between two points in Missouri. In an attempt to discourage union activity the employer disposed of certain equipment used in the intrastate shuttle bus service, discontinued that operation and discharged certain employees who were active in the unionization campaign. It appears from the report of the proceedings before the National Labor Relations Board that even after this step was taken the employer still supplied bus service between the two points served by the shuttle operation and that by far the greater part of its revenues was derived from intrastate operations which it continued to perform after abandoning the shuttle service. See 116 N.L.R.B. at 596, 597.[29] The reports of that case do not show that the withdrawal from the shuttle service, which was sometimes described as a "transfer" and sometimes as a "lease or sale," was permanent or complete (116 N.L.R.B. at 590, 591, 601 n. 11), and there is nothing in the reports that would justify the conclusion that the withdrawal had any economic impact on the employer that was in any sense comparable to the economic impact of the complete and final liquidation of Darlington.

It does not advance analysis to refer in general terms, as petitioners do, to the closing of a "part" of a business. That kind of broad brush treatment leaves unanswered the critical question, *i.e.*, what kind of "part" is involved. The rearrangement for discriminatory purposes of details of a company's operations, for example by the subcontracting of certain auxiliary tasks formerly performed by the employer directly, or by the discontinuance of subordinate operations

[29] There was evidence offered to the trial examiner that the abandonment of the shuttle line service was a sham, but the Board regarded the evidence as insufficient to support a finding to that effect. 116 N.L.R.B. at 591.

which does not substantially affect the continuance or general scope of the employer's profit-making enterprise, is entirely different from the kind of complete and final liquidation of a self-sufficient enterprise that occurred here. The partial liquidation of a business, involving the withdrawal of the capital invested in that part and the renunciation *pro tanto* by the employer of its opportunities for business success, should be subject to the same standards as those applicable to the complete liquidation of a business. As the Court of Appeals held here, a unique situation is presented by "the extinguishment altogether of [part or all of] the business and the end of further participation by the employer in his former sphere. The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business." (R. 1901).

The easy glide of the Board's opinion from the question of remedy to the question of substantive violation cannot conceal the realities of the situation or the highly artificial character of the Board's conclusion. It is one thing to conclude that once an unfair labor practice has been independently established adequate redress requires that the remedy extend to another business unit that was not directly involved in the substantive violation. It is quite a different thing to conclude that a relationship that may justify extension of the remedy can be used in the first instance to establish a violation of the statute. The failure of the Board to observe this distinction led it to the extraordinary conclusion that for the purposes of determining whether a substantive violation had been

committed the relationship between Darlington and Deering Milliken made Darlington comparable, for example, to one of several operations conducted in a single laundry. The fact is that Darlington was a separate corporation, it ran a separate mill and there was no single corporate entity of which it could rationally be considered an operating division. These are facts that cannot be disputed and would not be disputed by the Board despite its "single employer" finding. They distinguish Darlington's from every prior case decided by the Board or by a court. The imprecisions of speech that lead to the use of a phrase like "part of a business" to cover a number of very different fact situations, and the natural tendency to use convenient shorthand terms such as the "Deering Milliken mills" instead of a more accurate but more cumbersome form of words, should not be allowed to obscure these facts. They are critical to decision in this case.

B.

Even if the Board were correct in treating Darlington as merely one department of a single integrated employer, this would bring the case squarely within the scope of the line of cases already discussed, which hold that an employer may consider the economic impact of the advent or presence of a union as a factor in reaching management decisions as to the conduct of its business. (See pp. 43-51, *supra.*) If the Court concludes that the Board was wrong in its rigid insistence that the presence, conduct, threats or promises of a labor union can never be an economic factor which an employer may lawfully consider, then it can and should affirm the decision of the Court of Appeals

without reaching the question whether Darlington and certain related companies constituted a single employer.

C.

The single-employer doctrine has never before been employed as an element in finding an unfair labor practice where otherwise there would be none. The doctrine has evolved as an aid, once an unfair labor practice has been held to exist, in determining on whom the burden of carrying out the remedy may be imposed. *E.g., NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398 (1960). In the present case, in contrast, if it is true that an employer has a right to go out of business regardless of motive, then the Board's "single employer" holding transforms what would otherwise be lawful conduct into an unfair labor practice because of the employer's relation to other corporations. This is an unprecedented result and not one that should commend itself to this Court.

There may possibly be an appropriate case for transforming the "single employer" concept, which heretofore has been used solely for remedial purposes, into a standard for determining the legality of a course of conduct, but this is not such a case. On the facts found by the trial examiner in his exhaustive consideration of the matter, and the facts found by the Board, it is clear that imposition of "single employer" liability would be wholly inappropriate in this case.

It is undisputed that the corporations found by the Board to constitute a "single employer" lack substantial identity of ownership. No single individual or corporation holds a majority interest in any of them. The "Milliken family," which the Board treated

as a single entity having (directly or indirectly) a controlling interest in each of the corporations, in fact consisted in 1959 of 27 different individuals, many of them not very closely related to each other, and one estate. No showing was made that they act monolithically or as a unit. Moreover, most of the corporations are in substantial part owned by shareholders who are conceded to be unrelated by blood or otherwise to the Millikens. Independent shareholders owned at least 31 per cent of the stock of Darlington. (R. 1310). The independent ownership interest in the other mill corporations ranged as high as 45 per cent. (R. 1309-10).[30]

No court has held that different corporations constitute a single employer, for purposes of remedial liability and in circumstances like the present, when substantial identity of ownership is absent. The prior cases, it should be emphasized, relate to whether a remedy can be had against what is in form a separate entity for an undoubted unfair labor practice committed by another entity to which the first is related. They do not involve the farther-reaching issue here, which is whether conduct innocent if committed by a separate entity becomes actionable because of that entity's relationship to others. Where substantive liability is made to depend on the relationship, that relationship should be a tighter unitary relationship than where the only question is the nature of the remedy. Regard-

[30] The largest independent interest in any of the mills, 45 per cent, was in the Hartsville Cotton Mill, which as the plant geographically closest to Darlington would bear the brunt of the burden of the Board's order that Darlington's employees be reinstated at the other "Milliken" mills.

less of that fact we here meet the Board on its own ground and show that on that ground its decision cannot be sustained.

The courts have refused to find single employer status when it was shown that substantial identity of ownership was lacking, even though common majority ownership and common control were present. For example, in *Mount Hope Finishing Co.* v. *NLRB*, 211 F.2d 365 (4th Cir. 1954), the two corporations alleged to constitute a single employer were controlled by the same individual, who owned 100 per cent of one and 60 per cent of the other. The court appears to have regarded the 40 per cent minority interest as the determining factor in its holding that single employer status had not been shown. 211 F.2d at 372. In *NLRB* v. *Gibraltar Industries, Inc.*, 307 F.2d 429, 431 (4th Cir. 1962), the court listed "unity of interest" first among the bonds that must be found between two corporations before they can be held to be a single employer. *Accord, NLRB* v. *Jones Sausage Corp.*, 257 F.2d 878, 880 (4th Cir. 1958) ("substantial identity of ownership"); *NLRB* v. *Lund*, 103 F.2d 815, 819 (8th Cir. 1939). Board member Leedom was clearly correct in observing in the present case that "there is here an absence of common ownership within the meaning of the decided cases." (R. 34).

Petitioners have alleged here (*e.g.*, TWUA Br. p. 18) and in the Court of Appeals that various court cases support the proposition that vicarious liability may be imposed even in the absence of substantial identity of ownership. None of these cases in fact supports that proposition. In some of them the "single employer" issue was not raised on appeal and the opinions do not reveal whether substantial identity

of ownership was present. *E.g., NLRB* v. *Whittier Mills Co.*, 111 F.2d 475 (5th Cir. 1940); *NLRB* v. *Calcasieu Paper Co.*, 203 F.2d 12 (5th Cir. 1953); *NLRB* v. *Summers Fertilizer Co.*, 251 F.2d 514 (1st Cir. 1958). Certain cases hold that two or more companies without substantial identity of ownership constituted a single employer for purposes of determining an appropriate representation unit, *NLRB* v. *A. K. Allen Co.*, 252 F.2d 37 (2d Cir. 1958); *NLRB* v. *Arnolt Motor Co.*, 68 N.L.R.B. 868, 872-73 (1946), *aff'd*, 173 F.2d 597 (7th Cir. 1949), or for the purpose of vesting jurisdiction in the Board, *NLRB* v. *McCatron*, 216 F.2d 212 (9th Cir. 1954). But the test of being a "single employer" for these purposes can properly be much less stringent than that for the purpose of imposing vicarious liability.

In some of the cases cited all the companies found liable had themselves directly participated in the unfair labor practices in question. *E.g., NLRB* v. *Long Lake Lumber Co.*, 138 F.2d 363 (9th Cir. 1943). In others, the company held secondarily liable was one that had voluntarily succeeded to a business with notice of unfair labor practices previously committed therein. *NLRB* v. *Hopwood Retinning Co.*, 98 F.2d 97 (2d Cir. 1938); *NLRB* v. *O'Keefe and Merritt Mfg. Co.*, 178 F.2d 445 (9th Cir. 1949). In other cases the company held "secondarily" liable was both a direct participant in the unfair labor practices and also a successor (or predecessor) with notice, the transfer of technical ownership being held a sham or subterfuge. *NLRB* v. *United States Air Conditioning Corp.*, 302 F.2d 280 (1st Cir. 1962); *NLRB* v. *Lewis*, 246 F.2d 886 (9th Cir. 1957). In one case company *A*, held primarily liable, had independent shareholders, but company *B*, held secondarily liable, was wholly

owned by the majority shareholders who controlled company *A*. *NLRB* v. *Don Juan, Inc.*, 178 F.2d 625 (2d Cir. 1949). Thus none of the cases relied on stands for the proposition that vicarious liability under the National Labor Relations Act may be imposed on a company owned in substantial part by persons not connected with the company held primarily liable.

The reason behind the lack of precedent for such liability is clear. It may be justifiable to hold one corporation financially and remedially responsible for the acts of another when the ownership of the two is substantially identical. But when that factor is absent it obviously would work a grave injustice on the minority owners of the corporation held secondarily responsible, who are thus penalized for the acts of others over which they had no control and which they were powerless to prevent. "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). Much more is it "exceptional," indeed unprecedented, to penalize shareholders for acts committed by their co-shareholders in the conduct of a separate enterprise.

The injustice is well illustrated by the present case. How can it be justifiable to hold the 31 per cent minority owners of Darlington responsible for an unfair labor practice because of the other business affiliations of the majority shareholders? Conversely, how can it be justifiable to charge the minority shareholders of the other mill corporations—with interests running up to 45 per cent—with a pro rata share of the huge financial penalty imposed in this case and with the burden of eradicating the consequences of conduct by another company in which they had no

interest and over which they had no control? If it be said that it is the corporations, not the shareholders, which are being burdened, the answer is that that is inconsistent with the Board's "single employer" theory of responsibility, which is a form of "piercing the corporate veil." If a court or the Board is to "pierce the corporate veil" it must pierce it thoroughly and consistently, and with a due regard for the realities as to where the burdens it imposes will fall.

It is submitted, then, that the substantial disparities in ownership between Darlington and the other Milliken corporations, and among those corporations themselves, furnish a clear-cut basis for holding that they cannot constitute a single employer. But if the Court believes that consideration of this factor should be supplemented by an examination of the whole range of relationships among these corporations, then the sound procedure is a remand to the Court of Appeals.

* * * *

For the reasons advanced, the decision of the Court of Appeals can and should be affirmed either on the ground that it does not matter whether Darlington and the Milliken corporations constitute a single employer, or on the ground that as a matter of law they could not constitute a single employer for the purpose of finding an unfair labor practice in conduct that would be innocent were the one corporation engaging in the conduct considered individually.

If the Court should, however, decide that the Board is not plainly wrong on the law and that the "single employer" issue should be resolved on the evidence of record, the case should be remanded to the Court of

Appeals for appellate review of the Board's findings on this point. Such review has not yet been had, since the Court of Appeals found it unnecessary to decide the "single employer" question. The evidence introduced before the examiner on that question comes to more than 1,200 pages, more than two-thirds of the printed record. The examiner, who held that no single-employer status had been demonstrated, required 110 pages (R. 117-227) to state his findings of fact on what he considered a highly complex and intricate question. In these circumstances, due consideration for the proper allocation of labor among the courts and the burden on this Court's time suggests the wisdom of a remand to the Court of Appeals. See *NLRB* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951); *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 237 (1947). The Court would thereby avoid the necessity of sifting through a voluminous record without the benefit of the sharpening of the issues and isolation of the relevant materials that would result from a decision by the Court of Appeals on the "single employer" question. There is no dispute on this point between Darlington and the Board, which agrees that "the [single employer] issue would appear to be open on remand." (NLRB Pet. p. 10, n. 6a).

IV

THE INTERPRETATION OF THE ACT ASSERTED BY PETITIONERS RAISES GRAVE CONSTITUTIONAL ISSUES.

This case can and should be decided by this Court upon the basis that the Court of Appeals was correct in holding on this record that Darlington had an unqualified right permanently to go out of business. However, if the Act is interpreted to empower the Board to order Darlington to pay unearned wages to a large group of former employees during a period after all commerce had ceased and after the employer-employee relationship had completely terminated, then the underlying constitutional issues must be met.[31]

A. THE ACT AS CONSTRUED BY THE BOARD EXCEEDS THE POWER OF CONGRESS TO REGULATE COMMERCE.

The men who framed our Constitution were exceedingly wise. They were deeply versed in the long history of man's bitter struggle for freedom. From it they had absorbed the everlasting truth that freedom is mankind's most precious value, and the tragic truth that the insatiable thirst of government for power will inevitably extinguish freedom unless government is restrained by an organic law.

In distributing the powers allotted to the Federal Government, the Constitution vests in the Congress by Article I, Section 8, Clause 3, the power "to regulate

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[31] Board Member Rodgers avoided the "constitutional issues" (R. 36) by his reading of the Act, and the majority of the Court of Appeals was of the view that "a statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity." (R. 1899).

commerce with foreign nations, and among the several states, and with the Indian tribes." However, the regulatory power of Congress over persons or things connected with interstate commerce terminates when the connection of such persons or things with interstate commerce ceases. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 348 (1938); *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 387 (1950); *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U. S. 222 (1955).

The National Labor Relations Act uses the term "employee" 78 times, the term "employer" 64 times, the term "employment" 22 times and the term "commerce" 31 times. In all instances the terms "employee," "employer," "employment" and "commerce" are used in the Act in contexts which disclose that the Congressional purpose of the Act is to secure to employees the right to organize and bargain collectively through representatives of their choice with their employer in respect to their conditions of employment, and to prevent their employer from engaging in unfair practices which interfere with such rights only so long as the employment relationship exists between the employees and their employer, and only so long as their employer is engaged in interstate commerce or in an industry affecting interstate commerce. For Congress to attempt to deny to any employer the power and right to remove himself from the regulatory power of Congress under the Commerce Clause at any time, for any reason, by completely and permanently going out of business would exceed the scope of its power. Similarly, Congress would exceed its powers if it empowered the

Board to require a former employer to pay full or partial wages to former employees for periods subsequent to a withdrawal from business. In other words, the Commerce Clause would not justify an attempt on the part of Congress to require any person to become or to remain an employer in interstate commerce or in an industry affecting interstate commerce. Such an attempt on the part of Congress would be incompatible with the economic freedom which the Constitution is designed to secure to the people, both collectively and individually. Congress cannot use the Commerce Clause as a pretext for accomplishing either directly or indirectly purposes not entrusted to the Federal Government. *Linden* v. *United States*, 268 U. S. 5, 17 (1925).

It is necessary to keep in mind the true concept of the Act as set forth by this Court in *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10 (1940):

> "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees." *Cf. United Bhd. of Carpenters* v. *NLRB*, 365 U. S. 651 (1961).

B. THE ACT AS CONSTRUED BY THE BOARD DEPRIVES DARLINGTON AND ITS STOCKHOLDERS OF RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT.

The Fifth Amendment prevents the Federal Government or its agencies from depriving any person of his property without due process of law. This con-

stitutional provision preserves and protects the right of property, which is a natural, inherent and inalienable right that had its origin many centuries before the adoption of the Constitution.

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated by a statute even though the statute does not authorize the actual physical taking or destruction of the thing owned. A statute effects a deprivation of property within the meaning of this constitutional guaranty and for that reason is void if the statute undertakes to extinguish or impair any of the owner's rights in respect to the thing owned by him, such as his right to possess it to the exclusion of others, or his right to use it for any lawful purpose selected by him or his right to dispose of it. *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Chicago, R. I. & P. Ry.* v. *United States*, 284 U. S. 80 (1931).

Although Congress may permissibly regulate the commerce activities of Darlington, yet Congress must conform to due process in the choice of means to effect such regulation. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 558 (1937); *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 347 (1935). But, here the means chosen, *i.e.*, an order requiring the reinstatement of employees with back pay constitutes an infringement of Darlington's constitutional and common-law rights. And the union goes further by urging this Court to require Darlington to use any assets available to it to acquire by construction or otherwise another plant suitable for the production of textile goods, and resume the production of such goods after a lapse of eight years or more, irrespective of the wishes of either the majority or minority stockhold-

ers of Darlington and regardless of the corporate capacity of Darlington to engage in the textile manufacturing business.

If the foregoing affirmative acts should be required of it, Darlington would be deprived of its constitutionally protected rights to possess its property to the exclusion of others, to use its property for a lawful purpose selected by it rather than by an agency of the Federal Government, and to dispose of its property.

Other insurmountable objections which preclude the enforcement of the Board's order are the constitutionally protected rights of the stockholders of Darlington and the corporate incapacity of Darlington to engage in business.

Darlington was a private corporation chartered under the laws of the State of South Carolina in 1883 for the purpose of manufacturing textile products, and with many individual stockholders. These stockholders have rights falling into these two categories: (1) rights belonging to them as members of society; and (2) rights belonging to them as stockholders of the corporation.

As members of society, they have the rights of "liberty" and "property" which are protected against deprivation without due process of law by the Fifth Amendment. As stockholders of the corporation, they have the right by law to dissolve the corporation and receive as their individual property their proportionate shares of the corporate property or its proceeds remaining after the payment of the debts in existence at the time of the dissolution.

Pursuant to the authority vested in them by the law of South Carolina, embodied in sections 12-641 and 12-642 of the 1942 Code of Laws of South Carolina,

the stockholders of Darlington dissolved it, and thereby became entitled to receive their proportionate shares of its assets, subject only to the payment of its then existing debts and the costs of winding up its affairs. This event occurred more than eight years ago, and notwithstanding their constitutional right to the same, the undisbursed assets of Darlington have been withheld from its stockholders ever since that time.

In dissolving Darlington the stockholders exercised rights falling into each of the foregoing categories. They exercised the "liberty" protected by the Fifth Amendment by doing an act which they judged best for their interests and the right to dissolve Darlington secured to them as its stockholders by the laws of South Carolina.

There is no basis for the argument that in so doing the stockholders of Darlington infringed upon the rights of others. Neither the Federal Government nor any of its agencies had a right to prevent the stockholders of Darlington from dissolving the corporation, nor to require that their respective interests in the assets of Darlington should be devoted to the carrying on of a business or to the payment of wages allegedly lost by former employees of Darlington subsequent to the dissolution. Accordingly, the stockholders of Darlington would be deprived of their liberty and property in violation of the Fifth Amendment by the Board's order.

Congress cannot impose upon a private corporation any obligation whose performance is inconsistent with the powers conferred upon it by the laws of the state of its creation. In the absence of a state law making other provision, the dissolution of a corporation puts

an end to its existence and destroys every one of the powers possessed by it so that it cannot thereafter do anything whatever in its corporate capacity. *Greenwood* v. *Freight Co.*, 105 U.S. 13 (1881); *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U.S. 257 (1927): "It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect." *Matthews* v. *Bank of Allendale*, 60 S. C. 183, 38 S.E. 437 (1901); *Browne* v. *Hammett*, 133 S. C. 446, 131 S.E. 612 (1926).

South Carolina has limited statutes prolonging the corporate existence of corporations beyond their dissolution for liquidating and litigating purposes only. Section 12-601 provides that dissolved corporations "shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

Therefore, for all legal purposes and intents, Darlington has been a dead corporation except for the limited purposes of litigating controversies arising before its dissolution and liquidating its affairs since its dissolution, and it has been expressly barred by law from continuing the business for which it was established.

V

THE QUESTION OF REMEDY NEED NOT BE REACHED BY THIS COURT WHATEVER ITS DISPOSITION OF THE SUBSTANTIVE MERITS; IN ANY EVENT THE UNION'S PROPOSAL THAT DARLINGTON BE MADE TO RECONSTITUTE ITSELF SHOULD BE SUMMARILY REJECTED.

As affecting Darlington, the remedy ordered by the Board was the award of back pay from the time the company was liquidated and the plant closed in 1956 until the employees find substantially equivalent employment. The union contends that this remedy was inadequate, and that the Board should have ordered the reopening of the Darlington plant. (TWUA Br. pp. 30-42). The Board argues remedy only as a prop to its argument on the merits (NLRB Br. pp. 43-48), treats only of the "single employer" remedy, not the order directed to Darlington, and says that it does not "seek to anticipate questions which may be raised, on remand, in the court of appeals." (NLRB Br. p. 48). As indicated by the quotation from the Board's brief, the Court of Appeals, having set aside the Board's order on the merits of the supposed violation, did not reach the question of the remedy. That question would be for the Court of Appeals on remand should this Court reverse its judgment. The union, however, has invited this Court to go to the question of remedy. We here address a few comments to the union's extraordinary proposal that Darlington be required to recreate itself and reopen its plant and also, by way of indicating that the remedial questions for the Court of Appeals should there be a remand would be serious, to the arbitrary, punitive nature of the Board's prescribed remedy as it applies to Darlington.

1. The Board has, of course, broad discretion in shaping remedies and in exercising that discretion should consider all the relevant interests, factors and circumstances. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 198 (1941). The union's contention that the Board, once having found an unfair labor practice in the liquidation of Darlington, was obligated to take the unprecedented step of ordering construction and operation of a new textile mill at Darlington is utterly without merit.

As applied to Darlington Manufacturing Company, such an order would really run against its stockholders, since the company itself has no remaining assets sufficient for the construction and outfitting of a textile plant. If the union were to prevail, the individual and corporate stockholders of Darlington, many of whom have never been parties to this proceeding, would apparently be compelled to invest their funds in a new capitalization of Darlington so that the "restoration of the status quo" demanded by the union could take place. No tribunal has ever entered such an order, which would almost certainly be unconstitutional. It can hardly be seriously maintained that the Board exceeded its discretion in rejecting the union's proposal in favor of what was, as we shall see, an only slightly less startling remedy.

Even if the union's argument be read as a demand for an order that Deering Milliken alone establish a new textile plant at Darlington, the position is not very different. The union blithely ignores the substantial investment in plant and equipment necessary to create from nothing a brand-new textile mill—a major industrial undertaking even if, as the union maintains, capital investment required per production worker would

be "only" $10,050. (TWUA Br. p. 40). As already shown (pp. 8-9, *supra*), this Court cannot base a decision on the view that Darlington's business was absorbed by other Deering Milliken mills, let alone on the assumption that such business could be magically transferred back to a reconstituted Darlington. Neither is it accurate that the Darlington management was kept within the Deering Milliken "organization" and could readily be reassembled. The treasurer and chief operating officer of Darlington, for example, was not employed by any other Deering Milliken mill and left the textile business altogether. (Tr. 76). No responsible investors would decide on the location of a substantial new textile plant in a small town without thorough investigation as to the availability of adequate labor. The union's speculation that Darlington's former employees would be instantly available for employment is, at least, open to question. Investors also would be interested in whether there were reasonably in prospect orders for the goods the plant might produce. To require the construction of a plant which might have to close down almost immediately for lack of labor or lack of orders would be futile as well as punitive.

In refusing to order the resumption of operations at Darlington the Board could, moreover, consider the finding of its trial examiner, which it accepted, that Darlington had been in serious economic difficulties and might well have closed at any time. (See p. 9, *supra*.) Since there are thus strong indications that Darlington would have gone out of business years ago even had the Textile Workers Union of America never appeared on the scene, the Board was doubly justified in refusing to order its reconstitution now.

2. We agree with the position of the Board that questions with respect to the remedy should be remitted to the Court of Appeals if they arise. The Board's order raises certain serious and substantial questions that have not been considered by the court below but should be considered by it if the case is not disposed of, as it should be, by affirming its judgment that there was no violation.

As it stands, the Board's order is punitive and arbitrary as to Darlington. The Board awarded back pay to run from the time of the discharge of the workers late in 1956 "until the discharged employees are able to obtain substantially equivalent employment." (R. 22). The Board's decision was rendered on October 18, 1962, more than six years after the first employees were discharged in pursuance of Darlington's liquidation, and five years and eleven months after the last employees were discharged. Since Darlington's payroll as of October 1956 amounted to nearly $30,000 a week (R. 285), the Board's decision may entail a possible maximum payment of several million dollars for the period before the decision was rendered. This total would be substantially increased by the provision of the Board's order which imposes liability for back pay from the time since the Board's decision was handed down. The financial penalty that the Board asks this Court to uphold is many times greater than the capital worth of Darlington or the value of its stock at the time the liquidation occurred. (See p. 40, *supra.*)

The present case is the first in which the Board has imposed a back-pay liability running beyond the date when a business was finally and completely liquidated. Every previous back-pay obligation imposed by the

Board had expired at the date the employer went out of business. *E.g., Ray Nichols, Inc.*, 15 N.L.R.B. 846 (1939); *Cleveland-Cliffs Iron Co.*, 30 N.L.R.B. 1093, 1115 (1941), *enforced*, 133 F.2d 295, 302 (6th Cir. 1943); *Reynolds Corp.*, 74 N.L.R.B. 1622, 1672-73 (1947); *Randolph Corp.*, 89 N.L.R.B. 1490, 1495 (1950); *Colonial Fashions, Inc.*, 110 N.L.R.B. 1197, 1204 (1954). The doctrine of this line of cases was discussed and reaffirmed in *Barbers Iron Foundry*, 126 N.L.R.B. 30, 33 (1960):

> "[T]he Board has declined to order back pay beyond the date of the permanent cessation of business operations. . . . [W]e do not agree with the General Counsel's suggestion that an employer who permanently closes his plant and discontinues business operations should be ordered to continue paying wages to its employees, either for a definite period of time arbitrarily fixed by the Board (for example, 6 months), or for an indefinite period of time, the duration of which is contingent upon the employees' obtaining substantially equivalent employment elsewhere."

Accord, M. Yoseph Bag Co., 128 N.L.R.B. 211, 219 (1960).

In *NLRB* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 915 (8th Cir. 1954), it was expressly held that a back-pay obligation ceases when a plant is permanently closed. To the same effect is this Court's comment in *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942), that a permanent discontinuance of business terminates the duty of reinstating workers: since a back-pay obligation is contingent on a duty to reinstate, it too must cease when a business is liquidated.

The Board did not even discuss its departure from its own uniform rule in this case. Member Leedom, dissenting, correctly concluded that back pay should extend "only from the date of the discrimination to the date when the Darlington plant closed." (R. 34).

The rule previously applied by the Board is clearly the sound one, since when a business has been liquidated no date can be set that would represent the termination of employment absent the unfair labor practice in question. In this as in other areas, the Board previously applied the rule that there can be no back-pay award when the proper amount thereof is impossible to ascertain. See *e.g., NLRB* v. *Somerset Shoe Co.*, 111 F.2d 681, 689-90 (1st Cir. 1940); *Leo L. Lowy*, 3 N.L.R.B. 938 (1937). The unsoundness of a different rule is particularly clear in the present case, since it is conceded that there were economic reasons wholly unrelated to the presence of the union that would have fully justified a decision by Darlington to go out of business. The examiner found that "we cannot say that but for . . . [the] violation . . . [Darlington's] operations would have continued for any definite additional period." (R. 45). And "it may be that, absent the election, a decision would lawfully have been made to shut down in 1956 or shortly thereafter." (R. 58). "The [purely economic] factors cited were sufficient to support a decision to terminate operations; certainly it cannot be said that such a decision could not reasonably, or even unreasonably but credibly, be based on these factors." (R. 65). It was for this reason that the examiner refused to recommend any back-pay order extending beyond the date of the plant closing. The Board, while issuing such an order, did not dispute or set aside the examiner's findings just quoted.

Thus if its order were sustained the Board would be in the position of imposing upon Darlington a back-pay liability that is unknown and, in the nature of things, unknowable. More than that, it is a liability that Darlington, again in the nature of things, cannot act to limit, because, having liquidated, it is not in a position to reinstate the employees and so end their entitlement to back pay. Imposition of such a liability is plainly punitive, and the Board has no power to punish. *United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 655 (1961).

3. During the years in which this case was in process before the Board it was following a principle adopted by it many years ago that where a trial examiner's report had been favorable to the respondent, a subsequent back-pay award should be tolled from the date of the intermediate report to the date of the final decision reversing it. The examiner's report was favorable to Darlington in not imposing back-pay liability, and to Deering Milliken in not finding "single employer" status.

The Board abandoned this principle in its decision in *A.P.W. Prod. Co.*, 137 N.L.R.B. 25 (1962), which was handed down on May 2, 1962, a few months before its decision in the present case. On appeal, the Court of Appeals for the Second Circuit noted that there may be instances "where the adverse effects of retroactive overruling so far outweigh any possible benefits that administrative agencies may not properly exercise the power in question." *NLRB* v. *A.P.W. Prod. Co.*, 316 F.2d 899, 906 (2d Cir. 1963). It held, however, that the Board was not legally precluded from reversing its long-standing tolling policy in the case, although it did not "altogether approve the procedure here," be-

cause the decision related only to a single employee so that it was fanciful to suppose that the decision not to rehire him was made in reliance on the tolling rule.

In the present case, as in *A.P.W.*, the respondent throughout the Board proceeding believed it was operating under a rule that would toll a back-pay award from the time of a favorable trial examiner's report to the date of final decision. And it is far from fanciful to suppose that business judgments were based upon the tolling rule. Thus, the court below, if the case comes to it again, will be called upon to decide whether this is the kind of case the Second Circuit foresaw but did not have before it in *A.P.W.*

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 25, 1964.

APPENDIX

1. Labor Management Relations Act, 1947, § 1, 61 Stat. 136, 29 U.S.C. § 141 (1958):

Short title; Congressional declaration of purpose and policy.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

2. National Labor Relations Act, § 2(3), 49 Stat. 450, as amended, 29 U.S.C. § 152(3) (1958):

When used in this subchapter—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly

states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

3. National Labor Relations Act, § 8(a)(1), (3) and (5), 49 Stat. 452, as amended, 29 U.S.C. § 158(a)(1), (3) and (5) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1964):

Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered

by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.